



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

SUCCESSION CAUSE NO. 2 OF 2013

IN THE MATTER OF THE ESTATE OF THE LATE:

PAULUS ORESO AWINO..... DECEASED

AND

DAVID ODHIAMBO LUSI APPLICANT

VERSUS

LAWRENCE OKELLO ORESO.....RESPONDENT

**IN THE MATTER OF SUMMONS FOR REVOCATION OR ANNULMENT OF GRANT
ISSUED IN OYUGIS SMC SUCC NO. 95 OF 2007**

RULING

- LAWRENCE OKELLO ORESO** (Respondent) was issued with a grant on 19th February, 2008 and the same was subsequently confirmed on 15th May, 2008 in **Oyugis SPMCC No. 95 of 2007**. Lawrence had petitioned in that cause in his capacity as the son of the late **PAULUS ORESO AWINO** vide a letter dated 3rd September, 2007 written by **TITUS OLUOCH OKAL** (the Chief of KAMAGAK WEST LOCATION). The Letter indicated that the deceased's family had identified the petitioner to administer the deceased's estate on their behalf.
- The deceased's estate comprised Land Parcel **CENTRAL KASIPUL/ KAMUMA/1749**, and upon the confirmation of grant. The respondent applied to be the proprietor by transmission.
- Later on, the applicant (**DAVID ODHIAMBO LUSI**) learnt that LAWRENCE had obtained grant of Letters of Administration in respect of the deceased's estate and he filed a summons seeking revocation of the grant on grounds that the said **LAWRENCE** had made a false statement and concealed material information to the effect that he had other siblings namely **JOSEPH LUSI ORESO, SABIAUS AKUNGA MBIRA, WINSENGA OPIYO MBIRA** and **SAMUEL MBIRA ORESO**. Out of these siblings, three (3) are deceased but one survived by dependants - however **WINSENGA** is alive. The applicant's father was **JOSEPH LUSI ORESO** (Deceased).
- It is further stated that prior to issuance of the grant, the respondent sold portions of the said land to four purchasers, leaving out all the beneficiaries. In any event, the grant was confirmed prematurely.
- The respondent in reply confirmed that the applicant is a grandson of the deceased by virtue of being a son to the Respondent's late brother. He explained that before the time of his death the deceased

PAULUS ORESO AWINO had demarcated and apportioned his land to his five (5) sons inclusive of the applicant's father, and the only thing which remained was for the said portion of land to be surveyed for purposes of transfer and issuance of respective titles to the beneficiaries.

6. The respondent thereafter informed all the beneficiaries about his intention to file the succession cause and they consented. Consequently, he gave all the beneficiaries authority to dispose of their individual portions; and he sold his portion to one Mr. PAUL and one Mr. Puma. He insisted that the applicant is still living on his own late father's parcel - and he has sold parts of it to **ZACHARIA OMOLLO**.

7. At the hearing the applicant informed the court that his late father **JOSEPH LUSI ORESO** had the five named brothers, including the Respondent. However, when the respondent petitioned for letter of administration, for the estate of his late grandfather **PAULUS ORESO**, he was left out. He however conceded that his grandfather had divided the land among his sons, during his lifetime and his late father had been given a portion. He informed that the land which belonged to his father was sold by his uncle and currently he stays on land belonging to **ZACHARIA OMOLLO** but he still contends that he was not aware that his own father sold the land to **ZACHARIA OMOLLO**. His dilemma arose when **ZACHARIA OMOLLO**'s son **GEORGE** informed him that they wanted part of the land they lived on and actually took away the land in the presence of his father's brothers.

8. The Respondent explained that he did not include the applicant's father in the list of beneficiaries because he learnt that the brother had a separate piece of land. He further stated that their late father left a piece of land No. **CENTRAL KASIPUL/KAMUMA/1749** and that **JOSEPH LUSI**'s portion was not included in No. 1749.

9. Upon consideration of the evidence presented, Majanja (J) directed that summons to issue to **GEORGE OMOLLO** to explain how he obtained title in **CENTRAL KASIPUL/KAMUMA/383** which was said to be part of the deceased's land.

10. GEORGE OMOLLO informed the Court that parcel No. 383 is registered in the name of his father **ZACHARIA OMOLLO** and explained that the parcel was originally No. 440 and title was obtained in 1974, although his family comprising three (3) mothers and eight (8) sons had been in the land since 1963. He explained that the said parcel was given to his father by **PAULUS ORESO AWINO** the applicant's grandfather. The applicant's father decided to reside on the same parcel without **ZACHARIA**'S permission so when the sons realized this they told him to quit. That is when the applicant approached and pleaded with them to allow him to stay on while he sought land from his grandfather. He clarified that the title for No. 383 was as a result of adjudication and there was no transfer.

11. The trial Judge then ordered the District Land Registrar Rachuonyo to present evidence showing the history of the sub-division of parcel No. **CENTRAL KASIPUL/KAMUMA/1749 & 383** whereupon **WYCLIFFE OLONYI** explained to the court that Land Parcel No. 383 was registered in the name of **ZACHARIA OMOLLO** as first registration while parcel No. 440 was first registered in the name of **PAULUS ORESO AWINO** and it was then subdivided into parcel 1749 and 1750 by the original owner and it remained in his name. He was categorical that parcel No. 383 is still intact in the name of **ZACHARIA OMOLLO** but he did not carry records for 1750.

12. After hearing the parties Majanja (J) observed as follows

“it is apparent that the deceased had another property parcel No.1750 which was not included.

In the circumstances the schedule of assets was incomplete. The respondent is directed to file a further affidavit settling the unadministered assets of the deceased”.

13. When the matter next came up for mention, **Ms. Mimba** acting for the respondent). informed the court that a search certificate and green card for parcel No. 1750 showed that the parcel was transferred to **LEGIO MARIA CHURCH** and the title was issued was not known how. She did not present these documents in court.

14. She stated that it was not known how the land was transferred from Paulus Oreso, and that by the time the respondent filed the Succession Cause at Oyugis, the applicant's father had already transferred the land to **ZACHARIAH OMOLLO** who had been issued with a Title document.

15. It was upon hearing these submissions that Majanja (J) directed the chief of West Kamagak to resolve the issues relating to the estate of the deceased –in particular the portion occupied by the late **ZACHARIAH OMOLLO**, with a view to finding land settlement for **DAVID ODHIAMBO**.

16. The Senior Chief (**TITUS OLUOCH OKAL**)convened a meeting involving the families of Omollo and Oreso, and he filed his report dated 17/09/16 in which he stated that Akum Omollo on behalf of the Omollo family was not ready to sub-divide the land which David's father had formally sold to them. **WILSENG OPIYO** (from the Oreso family) then requested the respondent to sub-divide his piece and also request the Legio Maria Church to do so, so that the applicant gets settled immediately.

17. The report is not conclusive and does not assist this court- if the request had been made have the partes agreed to give up some land for David and if so, what portion. **LEGIO MARIA CHURCH** was not a party in the matter nor is any of their representatives shown as having attended the Chief's session so how do they end up being ordered to give part of their land in parcel No. 1750 whose records were not even presented to court.

18. Is the Respondent now willing to give the applicant some land from his share obtained after the registration via transmissions? This was not clarified in this court.

19. However what was abundantly clear is that both parcel No. 1750 and 1749 were created from parcel No. 440 and both remained in the names of the deceased **PAULUS ORESO**. If the deceased transferred 1750 to any third party then no tangible evidence has been presented to prove that –those are mere claims. There is also no evidence to show that the deceased had before the time of his death transferred parcel No. 1750 to the applicant's late father and there was no basis for leaving out the applicant's in the list of beneficiaries.

20. What emerges is that the respondent failed to disclose all the deceased's properties, and also failed to include all the deceased's beneficiaries – (namely the representatives of the late **JOSEPH LUSI**. To that extent then the Grant was improperly obtained and is revoked.

21. The applicant is at liberty to file fresh petition but he must include all the deceased's beneficiaries in the distribution of the estate.

DATED, SIGNED and DELIVERED at HOMABAY this 17TH day of NOVEMBER, 2016

H.A. OMONDI

JUDGE